No. 03-1592

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IN THE

Supreme Court of the United States

PREWITT ENTERPRISES, INC., *et al.*,

Petitioners,

—v.—

ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY FOR THE PETITIONER

The fundamental flaw in respondent's opposition to the Petition for a Writ of Certiorari is that it seeks to defend an opinion that the circuit court did not write. Respondent strains to portray the district court's opinion as an exercise of discretion not to fashion service of process pursuant to Rule 4(f)(3) and the circuit court's opinion as upholding that exercise of discretion, when both courts held that OPEC cannot be served with process *at all* as a matter of law. Respondent also strains to portray the circuit court's holding as a "fact-bound" opinion that depends on a large variety of factors unique to this case, when the *only* factor that the circuit court considered significant was the fact that Austria had passed legislation designed to insulate OPEC.

Respondent attempts to convey this misleading impression of the circuit court's opinion by quoting dicta from its footnotes and by quoting isolated phrases from the opinion without addressing the court's actual holding. However, even a cursory reading of the circuit court's opinion undercuts respondent's arguments, and demonstrates that the interpretation put forward in the Petition is correct. Respondent rests almost the *entirety* of its opposition to the Petition on its incorrect interpretation of the circuit court's decision and offers *no defense* of the circuit court's legal analysis. Nor does respondent defend the implications of the circuit court's holding, which allows *any* foreign government to insulate *any* defendant entity within its borders from service of process. Such a holding is indefensible, and granting certiorari is more than justified.

I. THE CIRCUIT COURT OPINION HOLDS THAT *ANY* FOREIGN SOVEREIGN CAN INSULATE *ANY* ENTITY WITHIN ITS BORDERS FROM SERVICE OF PROCESS.

OPEC quotes from dicta and out-of-context sentence fragments from the Eleventh Circuit's opinion in an attempt to make it seem that the circuit court did nothing more than decide "whether the district court's decision denying alternative service on OPEC constituted an 'abuse of discretion,' " Opp. at 12, and to make it appear that the circuit court's decision is so "fact-bound" that its holding would not actually allow all foreign sovereigns to protect any organizations located within their borders from U.S. service of process. *Id.* at 14. However, it is OPEC, and not the Petition, that miscasts the circuit court's opinion.

a. *Neither the district court nor the circuit court opinion reflected an exercise of discretion.* OPEC's argument that the district court and circuit court opinions reflect a proper exercise of discretion is simply inaccurate. Both the district court and circuit court opinions held, as a matter of law, that OPEC's Headquarters Agreement with Austria completely insulates OPEC from service of process.

The district court's one-sentence Order stating that OPEC "cannot in this case be effectively served with process," Pet. App. 19a, clearly demonstrates that it exercised no "discretion" in denying Prewitt's motion for court ordered service under Rule 4(f)(3). Rather, the district court ruled, as a matter of law, that OPEC "cannot" be served with process.

The circuit court's opinion is quite explicit in holding that, as a matter of law, OPEC cannot effectively be served with process under the Federal Rules. The

Eleventh Circuit stated: "[W]e are satisfied that under the facts and circumstances of this case, *directing service of process would constitute a clear abuse of discretion*." *Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916, 928 n.21 (11th Cir. 2003) (emphasis added). Since the circuit court held that directing service of process would constitute a "clear abuse of discretion," it plainly did not hold that the district court's refusal to fashion service of process constituted a proper exercise of discretion. Rather, the circuit court held that the *only* proper course of action for the district court was to deny Prewitt's motion to fashion alternative means of service.

b. *The only relevant factor motivating the circuit court was the Headquarters Agreement.* In its opposition to the Petition, OPEC puts forward two "circumstances" that it claims make service inappropriate in this unique case. Opp. at 10-11. These circumstances are the fact that "Prewitt had asked the district court to override the express terms of the OPEC Headquarters Agreement," *id.* at 10, and OPEC's view that "an antitrust lawsuit against OPEC would raise 'significant diplomatic considerations.' " *Id.* at 11 n.6. However, the circuit court said *nothing* about "diplomatic considerations"; the only circumstance that it cited in holding that service under Rule 4(f)(3) would be improper was the fact that the Headquarters Agreement provided that service on OPEC could only take place with OPEC's consent, and OPEC had stated that it would not so consent. *Prewitt*, 353 F.3d at 928.

OPEC claims that the circuit court's opinion does not actually "establish[ ] an absolute bar against service abroad in violation of foreign law." Opp. at 11. In so claiming, OPEC cites the circuit court's statement that "[w]e do not say that a district court *never* has discretion to direct service of process under Fed. R. Civ. P. 4(f)(3) that is in contravention of a foreign law." *Prewitt*, 353

F.3d at 928 n.21. This statement, however, is meaningless dicta that reveals the fundamental incoherence of the circuit court's decision. While the circuit court purports to allow district courts to direct service of process that contravenes foreign law, it fails to explain in what circumstances such service could be directed. A plain reading of the circuit court's holding—rather than its dicta—demonstrates that the Eleventh Circuit would *not* allow service that contravenes the law of a foreign state since the *only* factor that the circuit court considered significant in holding that service was improper was the fact that the Headquarters Agreement prohibited such service. *See Columbia Grain, Inc. v. Or. Ins. Guar. Ass'n*, 22 F.3d 928, 933 (9th Cir. 1994) (refusing to give effect to a case's dicta where the dicta "contradicts the case's holding").

OPEC attempts to reconcile the circuit court's dicta with its holding by arguing that the decision below is "fact-bound." Opp. at 14-15. However, here OPEC again attempts to defend an opinion that was never written. First, OPEC states that "the court of appeals relied on the sovereign character of the OPEC Headquarters Agreement, which 'was enacted into law by resolution of the Austrian Parliament.' " Opp. at 14. This fact does not undercut Prewitt's argument, since *any* country is capable of passing legislation designed to insulate a defendant from service of process. Second, respondent claims that the court of appeals based its holding that service would be improper on the "special character of 'international organizations such as OPEC.' " *Id.* at 14 (quoting *Prewitt*, 353 F.3d at 926). Respondent's statement is simply untrue. The circuit court *never* refers to OPEC's "special character," nor does it ever seek to explain how OPEC's status as an "international organization" would make service on OPEC uniquely inappropriate. In fact, the quotation from *Prewitt* that respondent cites is taken

from the opinion's discussion of service under Rule 4(f)(2)—not from its discussion of Rule 4(f)(3). *See Prewitt*, 353 F.3d at 925-26.

Thus, the circuit court held that OPEC could not be served with process under the Federal Rules only because *a foreign government had passed legislation stating that a defendant could not be served without its consent*. Under the circuit court's holding—as opposed to the misleading dicta that it employed—any foreign government could pass similar legislation insulating a defendant from service of process.

c. *The circuit court's opinion was wrongly decided.* With this proper understanding of *Prewitt*'s holding, it becomes obvious that the circuit court's opinion was wrongly decided. OPEC does not take issue with the Petition's legal analysis. Instead, OPEC's *only* defense of *Prewitt* is the incorrect argument that "Prewitt misstates the holding below." Opp. at 11.

The petition provides detailed analysis explaining why the decision below misreads Rule 4(f)(3). As the Ninth Circuit has explained, "service of process ordered under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country." *Rio Properties v. Rio International Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002). Moreover, in holding that the Advisory Committee Notes preclude service on OPEC, the circuit court both improperly elevated the language of the Notes over the plain text of Rule 4(f)(3) and also misread the Notes themselves. Pet. at 21-23. OPEC does not dispute any of this legal analysis.

II. THE QUESTION PRESENTED IS VITALLY IMPORTANT.

The circuit court's mistaken decision is the type that merits this Court's attention for four reasons. *First*, the

circuit court's decision creates a circuit split. *Second*, the circuit court's opinion creates a massive loophole in the service of process rules. *Third*, the decision of the court below subverts the restrictive theory of sovereign immunity embodied in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq*. *Fourth*, this is an appropriate case for certiorari.

a. *Circuit split.* The decision of the court below conflicts with the Ninth Circuit's opinion in *Rio Properties*, 284 F.3d 1007. While the Eleventh Circuit held that service under Rule 4(f)(3) is ineffective if precluded by foreign law, the Ninth Circuit has stated that the laws of a foreign state pose no barrier to service of process under Rule 4(f)(3). *Id*. at 1014 ("[A]s long as court-directed and not prohibited by an international agreement, service of process ordered under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country."). *See* Pet. at 13-16.

While OPEC argues that the decision below does not conflict with *Rio Properties*, its argument is entirely dependent on its contention that the Petition misreads *Prewitt*. *See* Opp. at 12. However, as explained in *supra* Part I, OPEC's reading of *Prewitt* is implausible.

OPEC makes two further arguments, both of which are facile at best. First, OPEC states that the court below properly held that *Rio Properties* was not applicable to the circumstances of the present case. This argument has already been answered in the petition, which explains that any factual distinctions between the two cases are irrelevant. Rather, the conflict between the two cases is demonstrated by the very principle that *Rio Properties* stands for, that it is acceptable for service under Rule 4(f)(3) to violate the laws of foreign states. Pet. at 14-15.

OPEC's second argument is that *Prewitt* is consonant with *Rio Properties* because both cases stand for the

proposition that denial of a motion for alternative service under Rule 4(f)(3) is subject to an abuse of discretion standard. Opp. at 13. There is no merit to the argument that the two cases are consistent because both claim to propound the same *standard of review*. Moreover, as explained in *supra* Part I, the abuse of discretion standard is irrelevant to *Prewitt* because both the district court and circuit court rested on the conclusion that OPEC could not be served as a matter of law.

b. *Massive loophole in the service of process rules.* OPEC does not take issue with the argument made in the Petition that, if petitioner's interpretation of *Prewitt* is correct, the decision creates a massive loophole in the rules governing service of process. Under the circuit court's interpretation, an agreement between a foreign state and a defendant can completely immunize the defendant from service. Colombia, Italy and Saudi Arabia could effectively insulate the Cali drug cartel, the Mafia, and al-Qaeda from service. *See* Pet. at 9-11.

While OPEC argues that this observation is "hyperbolic," there is *no* limiting principle apparent in *Prewitt* that would prevent such agreements from being extended to such organizations. A number of organizations hostile to the United States do enjoy the sponsorship of foreign states. Moreover, the Advisory Committee Notes to Rule 4(f)(3) express concern that foreign states may attempt to frustrate service of "a complaint seeking . . . to enforce the antitrust laws of the United States." Rule 4(f)(3) Advisory Committee Notes at 48. This concern cannot be regarded as hyperbolic, yet the circuit court's opinion would leave the federal courts with no way to prevent such frustration of the U.S. antitrust laws.

c. *Subversion of the FSIA.* The Petition explains that *Prewitt* turns the restrictive theory of sovereign immunity embodied in the FSIA on its head by allowing any

foreign states to completely immunize corporations or unincorporated associations within their borders by entering an agreement similar to the Headquarters Agreement. Pet. at 11-13.

OPEC replies that "Prewitt did not sue either OPEC or its member countries under the FSIA." Opp. at 15-16. This objection misses the point entirely. The point of the FSIA analogy is that the move from the absolute to restrictive theory of sovereign immunity was motivated in the first instance by the desire to prevent foreign countries' state trading companies from being insulated from suit while U.S. companies are amenable to suit in foreign courts. Pet. at 12. The absurdity of *Prewitt* is demonstrated by the fact that it turns the move to the restrictive theory on its head by creating a new class of foreign entities that can injure U.S. companies, and even file suit against U.S. companies, but cannot be sued by them. *Id.* The circuit court quite literally provided OPEC with protection *greater* than what a foreign sovereign would receive. *See* 28 U.S.C. § 1608. The fact that this lawsuit was not brought pursuant to the FSIA and yet OPEC (whose members are sovereigns) has received greater protection than it would if it *were* a sovereign, demonstrates just how *Prewitt* creates massive inconsistencies in U.S. law.

While OPEC contends that Prewitt's FSIA argument "is nothing more than a policy objection to the political and diplomatic judgments embedded in the service provisions of the OPEC Headquarters Agreement," Opp. at 16, Prewitt does not ask the Court to make *any* policy determinations. Instead, the Petition simply asks the Court to correctly interpret the laws of the United States.

It is OPEC and not the petitioner that attempts to foist policy considerations upon the Court. Rather than defending *Prewitt*'s holding, OPEC proffers a number of *policy*

concerns—such as "diplomatic considerations" and the "special character" of OPEC, *see* Opp. at 11 n.6, 14—that *the Eleventh Circuit never even mentioned*. Only OPEC can be described as raising policy objections to the laws of the United States, because only OPEC asks this Court to infer arguments that neither court below ever advanced in defense of an opinion that neither court below ever wrote.

d. *This is an appropriate case for a writ of certiorari.* This is an appropriate case for granting a writ of certiorari because the Eleventh Circuit's broad holding will allow this Court to clarify whether, and to what degree, Rule 4(f)(3) service of process may contravene the laws of a foreign state. The various factual distinctions put forward by respondent, such as "diplomatic considerations" and OPEC's "special character," only further demonstrate that this is an appropriate case for certiorari. After all, this Court has never before provided guidance to lower courts regarding when it is appropriate to exercise their discretion to *not* grant service of process pursuant to Rule 4(f)(3), and the distinctions raised by OPEC would provide this Court an ideal opportunity to do so.

OPEC provides two further reasons why it regards this case as inappropriate for certiorari, neither of which is compelling. First, OPEC contends that "it was improper for Prewitt to wait deliberately until after the district court had already dismissed its case before raising the Rule 4(f)(3) issues through a Rule 59(e) motion." Opp. at 12-13 n.9. This argument is devoid of merit, since the district court *specifically* stated that its first opinion holding that OPEC could not be served under Rule 4(f)(2) was "without prejudice to the right of [Prewitt] to pursue an alternative means of effecting service on [OPEC]." Pet. App. 36a.

Second, respondent states that OPEC "is not an 'unincorporated association' capable of being served under any prong of Rule 4(f)." Opp. at 12-13 n.9. This argument also lacks merit. OPEC is not a sovereign, and even if it were, its activities would be amenable to suit in the United States under the commercial activities exception to the FSIA. *See* 28 U.S.C § 1605(a)(2). Nor is OPEC considered an international organization under U.S. law, since the United States does not participate in OPEC pursuant to a treaty or act of Congress. 22 U.S.C. § 288. Both of these conclusions were already reached in *Prewitt*, *see* 353 F.3d at 922 n.9, and would not be difficult for this Court to reach.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for a Writ of Certiorari, certiorari should be granted.

Respectfully submitted,

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